No. 8668

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY EARL DUNLAP,
Appellant,

vs.

E. B. SWOPE, Warden of the United States Penitentiary at McNeil Island, Washington,
Appellee.

Answering Brief of Appellant

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Answering Brief of Appellant

In lieu of oral argument, appellant herewith submits argument answering appellee's brief:

THE QUESTIONS INVOLVED

The appellee sets forth a statement of the questions involved, on page 4 of his brief. The appellant must take exception to that statement, and restate the questions that are involved, viz:

1. Is whether petitioner is entitled to be released from confinement when he has served the legal sentence imposed upon him.

2. Whether three consecutive sentences may be imposed for a single offense—singular in intent and fact.

ARGUMENT

The sentence imposed upon petitioner is vague and doubtful. The appellee interprets the judgment to read: "The sentence of six years, on Count 5, to be served first." The judgment states that the six year sentence on Count 5, shall not start until the expiration of the two year sentence on Count 4; and is the last of the three sentences to be served.

The appellee makes no contention that any of the three sentences are in excess of the limitations of time, as prescribed by law. His contention is solely; that the trial court exceeded its jurisdiction in sentencing him in three separate instances for one offense.

The trial court might have legally sentenced petitioner to a term of ten years on Count 3. The sentence of the trial court on Count 3, was for a period of two years. That, then, was the intent of the trial court.

The determination of the offenses is by the facts and pleadings; the lesser crime was a part of the greater; and such argument as advanced by appellee on page 11 of his brief is not applicable.

There can be no evasion in such a manner as described by him; unless the court so wishes it, by reducing the charge from possession of silver coins, to possession of minor coins.

Petitioner contends that but one offense, with but one intent and one set of facts, were set forth in the

indictment. It is essential in all court procedure, that but one indictment can be brought for one offense—that the determination of the offense is made by the determination of the essential elements which go to make up the offense. It is well established precedent that where only one set of essential elements exist, where several crimes are charged; but one set of the offenses is punishable. With the essential elements of the offense in question being singular, it is contrary to established practice that the petitioner be made to serve several sentences. The petitioner bases that allegation on the law, as it is set out in the following instances by courts of record in the United States:

> "In creating an offense, the Legislature may define it by a particular description of the act or acts constituting it, or may define it as any act which produces—or is reasonably calculated to produce—a certain defined or described result. Where a person convicted of larceny, cannot later be tried for robbery; when larceny is an essential element of robbery. STATE vs. LEWIS, 9 N. C. 98; Am. Dec. 741.
>
> WHERE AN INDICTMENT, THOUGH CONSISTING OF SEVERAL COUNTS, IS FOUNDED ON A SINGLE TRANSACTION: THE VERDICT IS A UNIT AND LAYS THE FOUNDATION FOR BUT A SINGLE JUDGMENT. THE JUDGMENT, THOUGH PRONOUNCED BY THE JUDGE, IS NOT HIS DETERMINATION, BUT THAT OF THE LAW; WHICH DEPENDS NOT ON THE ARBITRARY OPINION OF THE JUDGE,

BUT ON THE SETTLED AND IRREVERSIBLE PRINCIPLES OF JUSTICE.

Some authorities—in absence of statute, have no right to give consecutive sentences. Ex Parte McGUIRE, 135 Cal. 339, 67 Pac. 327. 87 A. S. R. 105, PEOPLE vs. LISCOMB, 60 N. Y. 559."

The indictment as a pleading, sets forth the theories of the pleader; but the pleadings are only memorandum, from which the facts in law are to be ascertained. The pleader in this instance, set forth his pleadings *in toto;* alleging a series of offenses. The facts, as the pleadings testify, are, that but one single continuous offense was committed. The law is conclusive; a series of consecutive sentences in the judgment from such an indictment, is contrary to statute and therefore illegal. As witness the findings in the following:

"Prosecution for any part of a single crime, bars any further prosecution for the whole, or any part of the same crime; and the Government cannot split up one conspiracy and prosecute different indictments therefore. U. S. vs. WEISS, 293 Fed. 992.

The term 'Same Offense,' in Constitutional prohibition against double jeopardy, signifies same criminal act, or omission, rather than same offense *eo nomine.* (Const. Art. 2, #2); and the State, after electing to prosecute an offense in one of its aspects cannot prosecute for same criminal acts, under color of another name. HUNTER vs. STATE, ... Okl. Cr. App. ....., 277 Pac. 952.

Where it is necessary in proving one offense, to prove every essential element of another, growing

out of the same act, conviction on former is bar to prosecution for the latter. (U. S. C. C. A., Mich.) KRENCH vs. UNITED STATES, 42 Fed. (2d) 354.

Conviction or acquittal, of greater offense, is bar to subsequent prosecution for lesser offense included in the greater. STATE vs. PECK, 146 Wash. 101, 261 Pac. 779, followed in STATE vs. CHRISTOPH, 147 Wash. 698, 256 Pac. 1119.

A judgment on an indictment alleging in general terms every fact necessary to constitute offense, is bar to subsequent prosecution for any offense which could have been proved under the indictment. Acquittal of automobilist injuring two girls simultaneously, for manslaughter, bars prosecution for atrocious assault on the other. STATE vs. COSGROVE, ..., N. J. ....., 135 A. 871, 132 A. 231."

To pursue the course of reasoning to a conclusion, the point seems well established that the pleadings may set forth any number of separate counts. In the case at bar, the pleadings reveal that each count of the indictment was based upon a single act, which was an essential element in proving the charge of counterfeiting. The crime was of singular intent, and a continuous offense; inseparable in any part, from any part of the other. Therefore, the series of consecutive sentences in the judgment on such an indictment is irregular, and contrary to the irreversible principles of justice.

It seems to be the practice of the Legislative body, to call offenses by a variety of names and prohibit each

named offense, and provide punishment thereof. This made it necessary for the courts to render the interpretations set forth in the foregoing. One decision in particular, has been generally accepted by the courts, as the law in like cases; viz:

> "A criminal intent to commit larceny of property of the Government, is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into—or breaks into—a Post Office building, with intent to commit larceny therein and at the same time, commits the larceny, his criminal intent is one and it inspires his entire transaction, which is itself, in reality, but a single continuing act. It seems to be unauthorized, inhuman and unreasonable to divide such a single intent, and such a criminal act (42 L. R. A., N. S.) into two or more separate offenses and to inflict separate punishments on the various acts or transaction. Such as one for breaking—or the attempt to break—with criminal intent; another for larceny—with the same intent. Or, such as, one for the attempt to break; a second for the breaking; a third for the entering; a fourth for the taking of stamps; a fifth for the taking of other property; a sixth for the conversion of the property, and a seventh for carrying it away; all with the same criminal intent. And there is evidently no limit to the number of offenses into which criminal transaction, inspired by a single criminal intent, may be divided.
>
> If this rule of division and punishment is once firmly established, the theory that such an act and

intent could be punished as two separate offenses, has taken its rise in the Federal Courts in the decision of Circuit Judge McCrary, in Ex Parte PETERS (C. C.) 2 McCrary 403, 12 Fed. 461. At that time the Supreme Court of Connecticut, held in WILSON vs. STATE, 24 Conn. 57; that a conviction of larceny at the same time a burglary was committed, constituted no defense to a charge of the burglary. Chief Justice Waite, in an able opinion which has commended itself to the judgment of many courts, dissented from this conclusion and declared that: WHENEVER, IN ANY CRIMINAL TRANSACTION; A FELONIOUS INTENT IS ESSENTIAL TO RENDER IT A CRIME, AND WITHOUT PROOF OF WHICH, NO CONVICTION CAN BE HAD; TWO INFORMATIONS FOUNDED UPON THE SAME INTENT, CANNOT BE MAINTAINED."

It is respectfully submitted that the appellant was indicted on several counts for but one offense. No refutation of this allegation has been presented to this court. It is but meet and just, that appellant be discharged, as prayed for, from this illegal imprisonment and restraint.

HENRY EARL DUNLAP,
Attorney for Appellant.